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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/667,540	09/22/2003	Lawrence M. Boyd	1842-0024	9957
28078 7590 04/26/2007 MAGINOT, MOORE & BECK, LLP CHASE TOWER 111 MONUMENT CIRCLE SUITE 3250 INDIANAPOLIS, IN 46204			EXAMINER PHILOGENE, PEDRO	
			ART UNIT	PAPER NUMBER
			3733	
SHORTENED STATUTORY PERIOD OF RESPONSE		MAIL DATE	DELIVERY MODE	
3 MONTHS		04/26/2007	PAPER	

Please find below and/or attached an Office communication concerning this application or proceeding.

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

Office Action Summary

Application No.

10/667,540

Applicant(s)

BOYD ET AL.

Examiner

Pedro Philogene

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 15 February 2007.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 34-40, 42-47, 49, 51-65, 69-72 and 80-96 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☒ Claim(s) 54-65 and 69-72 is/are allowed.
- 6) ☒ Claim(s) 34-40, 42-47, 49, 51-53, 80-96 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

Claims 34-40,42-47,49,51-53,80-96 are rejected under 35 U.S.C. 102(b) as being anticipated by Hochschuler et al. (6,740,093).

With respect to claims 80-91,93-96, Hochschuler et al disclose a kit of parts for sealably introducing fluent material directly into a disc space through an opening extending through the annulus fibrosis of the disc comprising: a tube (24) having a passageway for the flow of fluent material (36) therethrough and an extent adapted to be received in the opening of the annulus fibrosis; as best seen in the FIGS; the tube having a seal (82) adapted to engage said annulus fibrosis adjacent the opening and to form a fluid-tight seal therewith; as set forth in column 6, lines 37-42, and a quantity of curable fluent material (36) adapted to be introduced in a fluid state into the disc space through the passageway of the tube, the material upon curing having properties substitutive of the nucleus pulposus; as set forth in column 3, lines 20-67, column 4, lines 1-65, column 6, lines 29-67, column 7, lines 1-34; and as best seen in FIGS.1-28.

With respect to the method claims 92,34-40,42-47, 49,51-53, the method steps, as set forth, would have been inherently carried out in the operation of the device, as

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set forth above. The method steps, such as , creating an opening through the disc annulus fibrosis; as best seen in FIG.1, distracting the vertebral bodies apart to increase disc height, FIG.3; sealably introducing under pressure a curable biomaterial having properties substitutive of nucleus pulposus when cured through the opening contiguously into the intradiscal space until the intradiscal space is substantially filled; column 3, lines 60-67, column 4, lines 1-20, column 6, lines 37-42; column 7, line 29; maintaining the seal and the pressure until the biomaterial is substantially cured in situ; column 6, lines 36-42, column 7, lines 25-34.

Allowable Subject Matter

Claims 54-65,69-72 are allowed.

Response to Amendment

Applicant's arguments, see Remarks, filed 2/15/07, with respect to the rejection(s) of claim(s) 34-40,42-47,49,51-53,80-92 under 102 have been fully considered and are persuasive. Therefore, the rejection has been withdrawn. However, upon further consideration, a new ground(s) of rejection is made in view of Hochschuler et al.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Pedro Philogene whose telephone number is (571) 272-4716. The examiner can normally be reached on Monday to Friday 6:30 AM to 4:00 PM.


If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Eduardo Robert can be reached on (571) 272 - 4719. The fax phone

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number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Pedro Philogene
April 23, 2007



PEDRO PHILOGENE
EXAMINER